

FIRESTONE MINING INDUSTRIES, INC.

IBLA 98-445

Decided August 20, 1999

Appeal from a cessation order issued by the Bishop, California, Field Office, Bureau of Land Management, requiring the suspension of all use and occupancy of a millsite (CAMC 270012), the removal of the mill building and personal property from the site, and the commencement of reclamation. CACA 30862.

Affirmed.

1. Millsites: Generally--Mining Claims: Millsites--
Mining Claims: Surface Uses

BLM properly issues a cessation order pursuant to 43 C.F.R. Subpart 3715, requiring the suspension of use and occupancy of a millsite and the removal of the mill building and personal property from the site where the claimant has failed to comply with previous notices of noncompliance and the use and occupancy are not reasonably incident to mining or processing operations because no mining or milling activities have occurred on the site for over 10 years. Absent milling related activities, no right to use the surface of a millsite exists.

APPEARANCES: Robert E. Richardson, Vice President, Firestone Mining Industries, Inc., Santa Rosa, California, for appellant; Steve Addington, Field Manager, Bishop Field Office, Bureau of Land Management, U.S. Department of the Interior, Bishop, California, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Firestone Mining Industries, Inc. (Firestone), has appealed a July 27, 1998, "Immediate Permanent Cessation Order" issued by the Bishop, California, Field Office, Bureau of Land Management (BLM), directing the

company to suspend all use and occupancy of mining claim CACA 30862, 1/ remove the mill building and all personal property from the land, and begin reclamation within 30 days of receipt of the order. BLM issued the cessation order after receiving no response to its March 23, 1998, notice of noncompliance advising Firestone that the company was not in compliance with the regulations at 43 C.F.R. Subpart 3715 because it had failed to submit a complete plan of operations, as required by a January 20, 1998, notice of noncompliance.

The Betty Jumbo #1 millsite embraces land within sec. 17, T. 13 S., R. 36 E., Mount Diablo Meridian, Inyo County, California. The mill on the site was built in 1978 after Inyo County approved a conditional use permit for a tungsten mining and milling project proposed by Firestone. The mill processed tungsten in the early 1980's and gold in the mid-1980's, but has not been used since then due to unfavorable market conditions. Firestone has been trying to sell the millsite and various associated mining claims since 1984 without success. 2/

BLM has issued several notices of noncompliance and cessation orders addressing the use and occupancy of the millsite, beginning with a March 28, 1988, notice of noncompliance sent to Argonaut American Corporation (see note 2, supra) ordering the removal of an unauthorized fence, gate, second trailer, and "No Trespassing" and "Private Property" signs and advising that changes to the existing plan of operations (CA-017- MP04-58) had to be submitted in writing in advance. Subsequent notices included an April 29, 1993, notice of noncompliance directing Firestone to clean up the site and submit a \$20,000 bond and California Surface Mining and Reclamation Act of 1975 (SMARA) reclamation plan, as required by Inyo County and BLM; 3/ a September 19, 1994, notice of noncompliance, pointing out Firestone's failure to complete the corrective action required by the earlier notices and the long-term nonoperational status of the mill and affording Firestone the choice of relinquishing the improvements to the

1/ While the decision refers to "mining claim CACA 30862," it is clear that "CACA" is not the proper designation for a mining claim. Mining claim and millsites receive recordation numbers in California with a "CAMC" prefix. In its response to Firestone's appeal, BLM identifies the affected claim as "mill claim CAMC 270012." (Response at 1.) The record confirms that the area in question is the subject of a millsite, not a mining claim, identified as the Betty Jumbo #1. Firestone raises no objection to the miscitation of "mining claim CACA 30862," and it is apparent that the parties are in agreement concerning the location of the facilities and equipment at issue.

2/ Firestone contracted to sell the property to Argonaut American Company in 1987 but foreclosed on the property in June 1989 due to Argonaut's failure to make the required payments. The legal battles surrounding this sale ultimately resulted in Firestone regaining ownership of the property in March 1992.

3/ The record contains a May 27, 1993, letter to Firestone from Inyo County requiring the SMARA reclamation plan and bond.

United States, removing the improvements itself, or submitting a plan of operations, reclamation plan, and \$20,000 bond and commencing active milling; and a November 17, 1994, notice of noncompliance, summarizing the previous notices and contacts with Firestone and requiring either the submittal of a plan of operations, SMARA reclamation plan, and \$20,000 reclamation bond and initiation of active milling, or the removal of all personal property and the reclamation of the site.

On December 14, 1995, BLM issued a decision record of noncompliance, rescinding all existing plans of operations, notices, and permissions because of the nonoperational status of the mill and Firestone's failure to comply with the prior notices and directing Firestone to remove all property from the site. Firestone sought a stay of the decision from BLM by letter dated December 27, 1995, stating that it had filed both a bond and a reclamation plan with Inyo County and it had plans to reactivate the mill.

There is no evidence in the record of any action by BLM on Firestone's request for a stay. Nevertheless, on January 18, 1996, Firestone submitted a plan of operations and reclamation plan to BLM. Firestone indicated that, although the mill had not been operated since the 1980's, it was currently negotiating with International Recovery, Inc. (IRI), to refurbish the mill and that it anticipated activating the mill within a few months.

By letter dated January 29, 1996, BLM notified Firestone that the plan of operations was incomplete and requested additional information. Firestone acknowledged the incompleteness of the plan in a letter dated February 5, 1996, and indicated that a detailed plan would be submitted upon consummation of its ongoing negotiations with IRI. BLM did not receive any additional data until September 8, 1997, when a copy of a loan commitment from Allied Trust to IRI was faxed to it.

On September 16, 1997, BLM issued an "Immediate Permanent Cessation Order" to Firestone, finding that the company had not submitted a plan of operations as required in the December 14, 1995, decision record and had failed to notify BLM of the extended period of nonoperation of the Betty Jumbo Firestone Mill. BLM concluded that Firestone's use and occupancy of the millsite therefore violated 43 C.F.R. §§ 3715.3-1(b) and 3715.5 because Firestone had not obtained all Federal, state, and local permits and authorizations or prevented unnecessary or undue degradation of public lands. BLM ordered Firestone to suspend all use and occupancy of the millsite, remove the mill and all personal property from the site, and begin reclamation of the site. However, on October 31, 1997, after receiving from Firestone a September 22, 1997, request for stay of the cessation order ^{4/}

^{4/} Firestone's Sept. 22, 1997, request for stay also stated that Firestone would appeal the cessation order in accordance with the appeal procedure outlined in the cessation order. BLM's subsequent revocation of the cessation order and its ultimate issuance of the order now on appeal renders moot any consideration of whether BLM should have treated that request for stay as a notice of appeal.

and its assurances that the sale of the mill to IRI would be completed on or before January 1, 1998, BLM revoked the cessation order to allow Firestone to complete the sale of the mill to IRI. BLM informed Firestone that failure to provide proof of the sale or otherwise vacate the site on or before January 1, 1998, would precipitate issuance of a cessation order for all use and occupancy of the millsite.

IRI faxed a preliminary plan of operations to BLM on December 29, 1997, and sent BLM an illegible fax purporting to be proof of the sale on January 1, 1998. In a notice of noncompliance dated January 20, 1998, BLM indicated that it was unsure whether Firestone was prepared to either move forward with the milling operation or sell the mill and afforded Firestone 30 days to submit a plan of operations demonstrating that its operation was reasonably incident to mining, constituted substantially regular work, and was reasonably calculated to lead to the beneficiation of minerals. BLM further advised Firestone that if its activities at the mill had ceased, it would have to remove all personal property from the land within 90 days from receipt of the notice, and that failure to comply would lead to issuance of a cessation order terminating all use and occupancy of the millsite. BLM followed this notice with a letter dated February 23, 1998, notifying Firestone that it had not received any information evincing that the mill had been or would soon be sold and that Firestone had 90 days to remove personal property from the site.

Although on March 16, 1998, BLM received a faxed copy of a letter to Firestone from IRI stating that financing for the purchase of the mill would be completed within 60 days, BLM issued another notice of noncompliance to Firestone on March 23, 1998. This notice found that Firestone had not provided the required plan of operations within the specified time period, thus establishing a record of noncompliance with the mining law use and occupancy regulations, 43 C.F.R. Subpart 3715. BLM informed Firestone that an appealable, immediate permanent cessation order could now be issued at any time for failure to prevent unnecessary or undue degradation of the public lands.

On July 27, 1998, BLM issued an "Immediate Permanent Cessation Order" to Firestone. BLM determined that Firestone's use and occupancy of the millsite violated 43 C.F.R. § 3715.2, which limits the activities justifying mining-related occupancy of public lands for more than 14 days in a 90-day period to those that are reasonably incident to mining or processing operations, constitute substantially regular work, are reasonably calculated to lead to the extraction and beneficiation of minerals, and involve observable on-the-ground activity. BLM also found that Firestone's use and occupancy violated 43 C.F.R. § 3715.3-1(b), which requires the claimant to have obtained all applicable Federal, state, and local permits and authorizations and 43 C.F.R. § 3715.5(a) which mandates that use and occupancy be reasonably incident and avoid unnecessary or undue degradation of public lands and resources. BLM ordered Firestone to suspend all use and occupancy of the millsite, remove the mill building and all personal property from the site, and begin reclamation within 30 days of receipt of the order.

Firestone appealed the cessation order to the Board and sought a stay pending appeal which we granted by order dated October 14, 1998. On appeal, Firestone argues that its activities at the millsite will fulfill BLM regulations. While acknowledging that there has been no milling or mining at the site for several years, Firestone insists that its activities are reasonably incident because it has been consistently working on reviving the mill. It asserts that, beginning in 1992, it began intensively negotiating the sale of its assets to IRI, completion of which would result in the reopening of the mill and the associated Reward Mine. Firestone states that, despite its and IRI's basic agreement, IRI's financial arrangements have taken considerable time to complete, and that no final decision has yet been made by the other entities involved in the sale. The long delays notwithstanding, Firestone anticipates reactivation of the mill and mine, noting that although the current all time low prices for gold and tungsten have rendered the economics of mining and milling ore difficult, experts predict that such activities will become profitable in the near future. Firestone contends that its mill is the only facility in the area capable of milling the ore and, for that reason, it should be preserved.

Firestone asserts that regular work is currently being done at the site, albeit at a slow pace, since the mill supervisor checks the property almost everyday, ensuring that the well is pumping and running water is available and that the electrical and plumbing systems function properly and are utilized regularly. The company contends that its activities are reasonably calculated to lead to extraction because, despite the low price of tungsten due to imports from China, the United States needs to maintain strategic reserves of valuable minerals. It adds that not only does the property have extensive proven tungsten reserves that can be mined and milled as needed, but proven gold ore bodies exist on the Reward Mine which would be profitable to extract as long as the price of gold maintains a reasonable level. Observable activity also occurs on the site, Firestone argues, since its wells regularly pump water and its staff maintains the property, prevents vandals and vagrants from disturbing the property, and keeps the property clean and safe. Firestone further avers that it holds all Federal, state, and local permits as required, and that its use and occupancy prevent and avoid degradation of the public lands because its mill supervisor carefully guards and protects the site which neither constitutes a hazard to anyone nor harms surrounding land or streams. Firestone states that it is willing to comply with the applicable regulations but submits that BLM needs to recognize the economic forces driving the mining industry and understand that the mill has not been abandoned but is an active business venture going through regular sale negotiations.

In response, BLM contends that the mill has been inoperable for 14 years, is not in working order, and has not secured necessary operating permits, and therefore must be removed from public land. BLM denies that Firestone's use and occupancy are reasonably incident to mining. BLM observes that Firestone has been trying to sell the mill for the past 8 to 10 years but no sale has been consummated, nor has Firestone submitted any evidence that a sale is imminent. BLM further asserts that the mere intent to mill, without actual milling activities, does not qualify the

use and occupancy as reasonably incident to mining or processing operations. Firestone's maintenance of the admittedly nonoperational mill and adjacent property does not suffice to fulfill the substantially regular work requirement, BLM submits, because on-going operations of a working mill involve the actual processing of mineral material on a substantially regular basis, not simply routine maintenance. Nor, according to BLM, does Firestone's speculation that mining and milling tungsten and gold should become profitable in the near future establish that its use and occupancy of the millsite are reasonably calculated to lead to the extraction and beneficiation of minerals, especially given the lack of documentation verifying the existence of a mine with reserves stockpiled to be milled and the dearth of local mines producing materials for processing on a regular basis. Finally, BLM avers that the use and occupancy do not involve the requisite observable on-the-ground activities in as much as the mill has not operated since 1984, no production from the mill has ever been witnessed or documented by any BLM staff person, and Firestone admits that no mining or milling is occurring.

[1] Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." In addition, 30 U.S.C. § 625 (1994) provides that all mining claims and millsites located on public lands "shall be used only for the purposes specified in section 621 of this title and no facility or activity shall be erected or conducted thereon for other purposes."

Effective August 16, 1996, BLM adopted 43 C.F.R. Subpart 3715, which implements those statutory provisions by addressing the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 Fed. Reg. 37115, 37117 (July 16, 1996). These regulations set forth restrictions on the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations and reasonably incidental uses. They also establish procedures for beginning occupancy, standards for reasonably incidental use or occupancy, prohibited acts, and procedures for inspection and enforcement, and for managing existing uses and occupancies. 61 Fed. Reg. 37116 (July 16, 1996). Additionally, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that *ipso facto* constitute unnecessary or undue degradation of public lands which the Secretary of the Interior is mandated by law to take any action necessary to prevent. 61 Fed. Reg. 37117-18 (July 16, 1996); see 43 U.S.C. § 1732(b) (1994). 5/

5/ The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident and are not authorized under any other applicable law or regulation, while uses that are reasonably incident and do not involve occupancy are governed by the surface management requirements of 43 C.F.R. Part 3800. 61 Fed. Reg. 37118 (July 16, 1996).

In its cessation order, BLM stated that Firestone's use and occupancy of the millsite was in violation of three separate regulations:

43 CFR 3715.2 - To occupy public lands for more than 14-days in a 90-day period, those activities that are the reason for the occupancy must:

- (a) be reasonably incident;
- (b) constitute substantially regular work;
- (c) be reasonably calculated to lead to the extraction and beneficiation of minerals;
- (d) involve observable on-the-ground activity.

[6/]

43 CFR 3715.3-1(b) - obtain all federal, state, [and] local permits and authorizations.

43 CFR 3715.5(a) - use and occupancy must be reasonably incident and prevent or avoid "unnecessary or undue degradation" of public lands and resources.

Citing 43 C.F.R. § 3715.7-1(a), BLM ordered Firestone to suspend all use and occupancy of the millsite.

The regulations define "reasonably incident" as being a shortened version of the statutory standard "prospecting, mining, or processing operations and uses reasonably incident thereto" and "includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit * * *." 43 C.F.R. § 3715.0-5. After the July 1996 promulgation of the regulations in 43 C.F.R. Subpart 3715, the Board issued a decision upholding the BLM Arizona State Director's decision affirming the September 22, 1995, issuance of a notice of noncompliance under the surface management regulations in 43 C.F.R. Subpart 3809 because no mining or mining related operations had occurred on various millsites since before December 1993. Richard Oldman, 146 IBLA 220, 223 (1998). In accordance with 43 C.F.R. 3809.3-7, the mill owner was required to remove all structures, equipment, and other facilities and reclaim the site. The Board stated therein that "[a]bsent mining or mining related activities, no right to use the surface exists." Id.; see Mr. & Mrs. Michael Bosch, 119 IBLA 370, 374 (1991).

6/ Not cited by BLM, but also listed in 43 C.F.R. § 3715.2 is subsection (e) which requires the claimant to "[u]se appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts."

In this case, Firestone admits that no mining or mining-related activities have occurred on the millsite since the mid-1980's. Firestone nevertheless insists that its diligent work to reactivate the millsite by negotiating a sale of its assets should render its use and occupancy reasonably incident because realization of the sale will ultimately lead to the resumption of milling operations on the site. The possibility that milling will recommence sometime in the future when the economics of such an undertaking become favorable, however, does not justify current use and occupancy of the millsite. Because Firestone has no right to use or occupy the surface of the Betty Jumbo #1 millsite unless actual mining or mining-related operations are taking place, its use and occupancy are not reasonably incident. Accordingly, we affirm BLM's conclusion that Firestone violated 43 C.F.R. §§ 3715.2 and 3715.5(a).

We also conclude that BLM properly issued a cessation order to address Firestone's use and occupancy because 43 C.F.R. § 3715.7-1(b)(1)(i) provides that BLM may order a temporary or permanent cessation of all or any part of use and occupancy that is not reasonably incident.

The record further demonstrates that Firestone does not have an approved plan of operations for the Betty Jumbo #1 millsite for which it received a notice of noncompliance. Although both Firestone and IRI submitted preliminary plans, those plans contained serious deficiencies precluding their acceptance. Therefore we uphold BLM's conclusion that Firestone violated 43 C.F.R. § 3715.3-1(b) which requires a claimant to have obtained "all federal, state and local mining, reclamation, and waste disposal permits, approvals, or other authorizations for the particular use or occupancy as required under this subpart."

The failure to comply with BLM's notice of noncompliance provides, under 43 C.F.R. § 3715.7-1(b)(1)(ii), another basis for the issuance of the cessation order in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge